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No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Brief on the Merits of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Table of Appendices	vi
Brief on the Merits of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford as Members of the Florida Elections Canvassing Commission	1
I. Summary of the Argument	1
II. Statement of the Case and Procedural History	2
A. The November 21, 2000, Decision of the Florida Supreme Court (*Harris I*)	2
B. The Present Case (*Harris II*)	6
III. Argument	8
A. The Decision Below and in *Harris I* Dramatically Changed the Purpose for Which Manual Recounts May Be Used.	8
B. Although the Court Below Created New and Unprecedented Rights to Manual Ballot Counts, it Created No Standards by Which Such Counts Are to Be Conducted.	14

Contents

Page

C. The *Harris II* Decision Further Modifies the Legislative Scheme Meant to Ensure Timely Election Results. 20

D. The Proceedings On Remand Demonstrate the Serious Flaws in *Harris II*'s Demands. 21

IV. Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998) 8

Boardman v. Esteva, 323 So. 2d 259 (Fla. 1976) .. 21

Bouie v. City of Columbia, 378 U.S. 347 (1964) .. 22

Bush v. Palm Beach Canvassing Board, 2000 WL 1731262 (U.S. Nov. 24, 2000) 5, 6

Fladell v. Palm Beach Canvassing Board, 2000 WL 1763142 (Fla. Dec. 1, 2000) 12

Gore v. Harris, 2000 WL 1800752 (Fla. Dec. 8, 2000) ..... *passim*

Nelson v. Robinson, 301 So. 2d 508 (Fla. 2d DCA 1974) 12

Palm Beach Canvassing Board v. Harris, 2000 WL 1725434 (Fla. Nov. 21, 2000), *vacated*, *Bush v. Palm Beach Canvassing Board*, 121 S. Ct. 471 (U.S. Fla. Dec. 4, 2000) ..... *passim*

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Cited Authorities

	Page
United States Constitution:	
Article II	6
Article II, § I	13
Statutes:	
3 U.S.C. § 5	6
Fla. Stat. § 101.20	12
Fla. Stat. § 101.46	10, 12
Fla. Stat. § 101.015	17, 19
Fla. Stat. 101.5606	13
Fla. Stat. § 101.5611(a)	10
Fla. Stat. § 101.5614	18, 19
Fla. Stat. § 101.5614(5)	7
Fla. Stat. § 102.012(8)	12
Fla. Stat. § 102.111	7, 20, 21
Fla. Stat. § 102.112	20

Cited Authorities

	Page
Fla. Stat. § 102.141	21
Fla. Stat. § 102.166(5)	10
Fla. Stat. § 102.168	8
Fla. Stat. § 102.168(3)(c)	6, 8, 9
Cal. Elec. Code §§ 15628-15631	16
Col. Rev. Stat. 10-10.5-102	15
Fla. Admin. Code. R. 1S-2.015	17
Ind. Code Ann. § 3-12-1-9.5	15, 16
Iowa Code Ann. § 50.48	16
Neb. Rev. Stat. § 32-119	16
Tex. Elec. Code Ann. § 127.130	16
W. Va. Code § 3-4A-28	16

TABLE OF APPENDICES

Page

Appendix A — Transcript Of Motions Hearing Of The Circuit Court Of The Second Judicial Circuit, In And For Leon County, Florida Dated December 9, 2000 ..... 1a

Appendix B — Order On Remand Of The Circuit Court Of The Second Judicial Circuit In And For Leon County, Florida Dated December 9, 2000 ..... 63a

Appendix C — Objections Of Secretary Of State And Elections Canvassing Commission Dated December, 2000 ..... 67a

Brief on the Merits of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford as Members of the Florida Elections Canvassing Commission

I. Summary of the Argument

The Supreme Court of Florida created many new provisions in Florida's election laws on November 21, 2000, by applying common law and constitutional principles to change the opportunities for and method of conducting a manual recount, changing the dates for election certification, authorizing amendments to previously-filed certifications even after the statutory deadline had passed, removing much of the discretion granted to the Secretary of State to administer Florida's electoral system, and granting significantly expanded powers to local canvassing boards. *Palm Beach Canvassing Board v. Harris*, 2000 WL 1725434 *3 (Fla. Nov. 21, 2000) ("*Harris I*"), vacated, *Bush v. Palm Beach Canvassing Board*, 121 S. Ct. 471 (U.S. Fla. Dec. 4, 2000) ("*Bush I*"). This Court vacated that order and directed the Florida court to clarify its reasoning, which it has not yet done.

The decision below, while acknowledging the legislature's role, expands upon, and continues to give effect to, its vacated order and further encroaches upon the legislative scheme and the powers delegated by the legislature to the Department of State, the Division of Elections and the Elections Canvassing Commission. In particular, the decision (i) continues to allow manual recounting based on mere allegations of voter error, (ii) creates a new counting methodology, unknown in the legislative scheme, which allows vote tabulation equipment to

be used to screen votes for manual counting, and (iii) creates what is in effect an absolute right to a manual recount whenever the number of ballots counted with no-vote for an office exceed the margin of victory of one candidate. In addition, the court continued to apply, and actually expanded, the alternative certification deadline created in its previous order. As noted by Chief Justice Wells in his dissent, the decision of the Florida court "has no foundation in the law of Florida as it existed on November 7, 2000, or at any time prior to the issuance of [the decision below]." *Gore v. Harris*, 2000 WL 1800752 (Fla. Dec. 8, 2000) ("*Harris II*"), at 41 (Wells, C.J. dissenting).[1]

These actions by the Supreme Court of Florida do significant violence to the legislative scheme, in direct contravention of the exclusive grant of authority over presidential elections granted to state legislatures, makes *post hoc* changes to the Florida electoral system, and raises serious and far reaching concerns that would have been avoided by applying the Florida legislative scheme as written.

II. Statement of the Case and Procedural History

Both of the Florida Supreme Court's decisions *Harris I* and *Harris II* make substantial changes to Florida's Election Code, as it existed on November 7, 2000.

A. The November 21, 2000 Decision of the Florida Supreme Court (*Harris I*)

In *Harris I*, the Florida Supreme Court changed the election law of Florida as it existed on November 7 in several material respects:

1. The text of this opinion can be found at Tab A to Petitioner Bush's Index of Exhibits.

- County canvassing boards *now* have the authority to amend certified returns filed within the statutory deadline for up to 12 days after the deadline for certification of the election results to accommodate manual recounting (i.e., the protest period was extended from 7 to 19 days);

- The Commission *now* must accept amended election returns filed after the statutory deadline so long as the filing does not violate the Florida Supreme Court's judicially-created alternative deadline of November 26, designed to accommodate manual recounting in this election;

- The Commission *now* is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments may be submitted to reflect manual recounts that extend beyond the deadline;

- County canvassing boards *now* enjoy broad discretion to order manual recounts in selected counties for a statewide election, even when the "error in vote tabulation" (i.e., the failure of the tabulation system) required under the statute has been found not to exist, and irrespective of whether the recount will extend beyond the statutory deadline for filing election returns; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will *now* be decided based on standards developed by individual canvassing boards in selected areas of the state.

From the outset of *Harris I*, the Florida Supreme Court made clear that "hyper-technical statutory requirements" must give way to the right of suffrage implicit in the Florida Constitution. *See id.* at *4 ("the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases."); *id.* at *6 ("all political power is inherent in the people"). After reviewing the relevant portions of the Florida Election Code, the court observed that:

> the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. *The statutes make no provision for exceptions following a manual recount.* If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11 (emphasis added).

The court then looked to principles of Florida constitutional law and stated that the judiciary must "attend with special vigilance whenever the Declaration of Rights is in issue," and that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished." *Id.* at *12.

In accordance with these general principles, the court held that "the Legislature may enact laws regulating the electoral process . . . only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage." *Id.*

Looking as well to principles of Florida constitutional law for guidance, the court concluded:

> Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

This Court subsequently granted Governor Bush's petition for certiorari review to address whether the Florida court's decision conflicted with federal constitutional and statutory law. *Bush v. Palm Beach Canvassing Board*, 2000

WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, this Court issued an opinion in which it vacated the Florida Supreme Court's decision. *Bush v. Palm Beach County Canvassing Board*, 2000 WL 1769093 at *4 (U.S. Dec. 4, 2000). In its decision, this Court asked the Florida Supreme Court to clarify its opinion concerning its impact on the legislature's power to select the method of appointing electors for President and Vice President of the United States in light of 3 U.S.C. § 5 or article II of the U.S. Constitution. *Id.* In so doing, the Court counseled:

> Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at *3. The Florida Supreme Court has not yet responded to this Court's mandate.

B. The Present Case (*Harris II*)

On November 27, 2000, Vice President Albert Gore, Jr. and Joseph I. Lieberman (the "Gore Respondents") filed an election contest under section 102.168(3)(c), Florida Statutes (2000), one day after the newly-created conclusion of the protest period. This section provides that an unsuccessful candidate may contest an election when there has been, among other things, a "rejection of a number of *legal votes* sufficient to change or place in doubt the result of the election." (Emphasis added.) After a two-day bench trial, the trial court denied the Gore Respondents any relief and entered a judgment in favor of the defendants. The Gore

Respondents immediately appealed. The intermediate district court of appeal passed the case through to the Florida Supreme Court.

On review, the Florida Supreme Court reversed the trial court in part and ordered that partial manual recounts previously performed by the canvassing boards of Miami-Dade and Palm Beach counties be counted notwithstanding the fact that they were certified after the judicially-created deadline set in *Harris I*.[2] Moreover, the court ordered a statewide manual recount of the so-called "undervotes" in all counties where the undervote had not been subjected to a manual recount. *Id.* at 2. The court's decision is bottomed on a holding that "a legal vote is one in which there is a 'clear indication of the intent of the voter' " (*Id.* at 25), which is borrowed from section 101.5614(5). That provision deals with counting of damaged or defective ballots, which are not at issue here.[3]

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2. This, of course, conflicts with the court's prior ruling that all manual recounts *had to be* completed by 5 p.m. on November 26, 2000. Even assuming the validity of the extension of the protest period, these counties were not able to complete their manual recounts on time and, therefore, should not have been able to amend their certifications. *See* Fla. Stat. § 102.111 (2000).

3. The proceedings in the trial court upon remand, and the trial court's order on remand entered before this Court's stay, are contained in Respondent's Appendix. The trial judge was constrained to a specific number of actions based upon the language of *Harris II*.

III. Argument

A. The Decision Below and in *Harris I* Dramatically Changed the Purpose for Which Manual Recounts May Be Used.

The Supreme Court of Florida's decision is a further extension of its previous holding and reflects further developments in the Florida Election Code. As noted by Chief Justice Wells in his dissent below, there is no basis under the section 102.168 or any other provision of the Election Code for a manual recount, let alone a recount of only the so-called "undervotes," when there is no justification other than voter error.[4] The Gore Respondents cite no instance in Florida election history when a manual recount was conducted because of an allegation that the total number of undervotes was greater than the margin of victory.[5]

Section 102.168, Florida Statutes, imposes a burden on the contestant to show, among other things, that "*legal* votes sufficient in number to change or place in doubt the result of the election" were rejected. Fla. Stat. § 102.168(3)(c) (2000)

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4. *See Harris II*, at 41 (Wells, C.J. dissenting) ("My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.").

5. The appellees cannot rely on *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998). There, the issue was not — as has been asserted — voter error, but rather whether "fraud," "gross negligence" or "incompetence" by election officials who re-marked ballots so that they could be counted by an electronic scanner should void an election. *Id.* at 723-24.

(emphasis added). In this case, legal votes were not rejected. "Legal votes," as that term is used in section 102.168(3)(c), means votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places. By properly executing their ballots, voters can ensure that their vote will be counted by the tabulation machinery. Otherwise, these same voters risk having their vote disregarded. No other definition for "legal votes" fits the legislature's scheme.

The Division of Elections, charged with interpreting and enforcing the Florida Election Code, has opined that there is no basis in the legislature's scheme for a manual recount because of voter error. Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion,[6] stating that:

> [a]n "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. Unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused

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6. Although this opinion was written in the context of an election protest, the basis of the opinion is equally applicable to an election contest.

> by incorrect election parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor perform any action specified in Section 102.166(5)(a) and (b) of the Florida Statutes.

Bush I JA 57. Both the plain language and legislative history of Florida's election statutes indicate that the Division was correct: a manual recount of the ballots is proper only when there has been a failure of the vote tabulation system, i.e., the counting apparatus. Fla. Stat. § 102.166(5) (2000).

The legislature has set out an elaborate system to ensure that all voters are educated on how to vote. In the weeks before the November 7, 2000, general election, each registered voter in the state was provided with a sample ballot and detailed instructions on how to vote according to the method used in his precinct. *Id.* § 101.46. For the instruction of voters on election day, each polling place is provided with instructions illustrating the manner of voting with the particular system in use. By law, before entering the voting booth, each voter is to be offered instruction in voting by use of the instruction model, and each voter is to be given "ample opportunity" to operate the model. *Id.* § 101.5611(a).

Additionally, a copy of the instructions was placed prominently in each voting booth. For those areas using punch cards, including Miami-Dade and Palm Beach counties, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. As is evident from the instructions used in Palm Beach County, the instructions were clear and complete. Harris Appendix to Response to Petition for Writ of Certiorari in Case No. 00-836.

The voter instructions were designed to prevent both undervoting and overvoting, and thus to ensure that each voter's choices were tabulated. To prevent undervoting, the instructions explained in oversize type that each voter must check his or her ballot card to make sure that the desired punched positions were fully perforated, and that no chad remained partially attached in the selected punch positions. The instructions included this specific action:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id.[7]

To prevent overvoting, the instructions directed voters to refrain from attempting to correct mistakes on ballots. Voters were told to instead obtain a new ballot, on which their selections could then be properly noted: "If you make a mistake, return your ballot card and obtain another." *Id.* Any voter following this direction would have cast only one vote for each office and his or her ballot would have been at no risk of invalidation based on overvoting.

In case any voter, after entering the voting both, asks for instructions about how to vote, two election officers who are not members of the same political party shall assist and give instructions, then leaving the voter to vote in secret. *Id.*

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7. At no time, although frequently urged upon it, has the Florida Supreme Court made any comment upon these instructions and how they might impact the issue of voter intent.

§ 101.46. The fact that this assistance is available is made clear in the "NOTICE, Instructions to Voters" that are posted at all precincts. Moreover, all inspectors, clerks, and deputy sheriffs are given training classes for the purpose of instructing such persons in their duties and responsibilities as election officials. *Id.* § 102.012(8). In addition, sample ballots are furnished to each polling place as are a number of reduced-size ballots that are made available to any voter so requesting. *Id.* § 101.20.

When voters followed these instructions, the automatic tabulation system accurately tabulated the ballots. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recount at issue.

Plainly stated, the type of manual recount allowed — indeed, required by the Florida Supreme Court — does not address the failure of automated equipment to tabulate properly executed ballots, the only purpose for which manual recounts were allowed under Florida law as it existed on election day. The sole purpose of the recount mandated by the Florida Supreme Court is to allocate additional votes to certain candidates based on those ballots that voters failed to execute properly even after receiving clear instructions. To accomplish this result, small armies of local government employees are left to divine, without clear standards to guide them, the intent of electors who failed to clearly mark their ballots. Florida law in no way compels such a result. *See Fladell v. Palm Beach Canvassing Board*, 2000 WL 1763142 (Fla. Dec. 1, 2000) (rejecting challenge to Palm Beach County's so-called "Butterfly Ballot"); *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("Mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

There can be no doubt that the Florida Supreme Court's decision creates new rights and obligations. *See Harris II* at 55 (Wells, C.J., dissenting) ("Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision."). Again, the legislature was well within its right to set forth a scheme whereby voters that followed the proper procedure were deemed to have cast legal votes. *U.S. Const. art. II, § I.* Those who did not follow instructions ran the risk that their vote would not be counted. It is critical to note that the no votes at issue here include ballots that contain chads that for one reason or another were never fully dislodged. Under the Election Code, these votes are not legal votes. Moreover, there was absolutely no evidence that the ballots were damaged.

Another indication that manual recounts are not available for voter error is found in section 101.5606, Florida Statutes (2000). This section requires that all electronic or electromechanical voting systems used must be capable of correctly counting votes. If the Florida Supreme Court is correct in its broad definition of a legal vote, then there can no longer be any voting machines because those machines will never be capable of counting all the votes. The Florida Supreme Court's opinion relegates the voting machines to a screening device used to locate undervotes and is thus anathema to this section, among others, of the Code.

A simple reading of the Florida Supreme Court's decision, especially under the light of Chief Justice Wells' powerful and persuasive dissent, can lead to only three conclusions: (1) the Florida Supreme Court made new law

when it ordered a manual recount based on unsubstantiated allegations of voter error; (2) the court made new law by requiring that only the "undervotes" be counted, instead of *all* ballots; and (3) the court made new law by requiring a manual recount whenever the number of undervotes exceeded the margin of victory.[8]

B. Although the Court Below Created New and Unprecedented Rights to Manual Ballot Counts, it Created No Standards by Which Such Counts Are to Be Conducted.

Because the Florida legislature never authorized manual recounts to correct voter error, it has enacted no standards by which to judge improperly executed machine ballots. The utter lack of objective standards in the partial manual recount ordered by the court below will inevitably lead to a chaotic counting process with different counting methodologies being applied in different areas of the state:

> [T]he majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial court, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by [the

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8. In fact, that is what the court held. *Id.* at 23 ("Here, there has been an undisputed showing of the existence of some 9,000 'under votes' in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or 'no vote registered' ballots, has been made."). That is not what the statute says; this a new rule enunciated by the Florida Supreme Court to facilitate selective recounting.

> trial judge]. . . . It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards. . . .

Harris II at 56-57 (Wells, C.J., dissenting).

Other states, unlike Florida, that provide broad manual recount rights for correction of voter error also generally provide standards by which to judge the ballots. For example, Indiana provides clear and definitive standards for manual counts of erroneous ballots, requiring ballots with pierced or partially detached chads to be counted and ballots with mere indentations to be considered as having no vote. *See* Ind. Code Ann. § 3-12-1-9.5 (West 2000). The fact that Florida has no similar objective standards underscores that the Florida Legislature did not intend manual recounts to be used to correct voter error.[9] Many states, like Florida, use manual recounts solely to confirm machine calibration or correct machine failure.[10] Additionally, states with liberal

9. The only other conclusion would be that the legislature chose to enact a system that is so fraught with subjectivity that it denies due process and equal protection. A system that allows votes to be evaluated differently based on where the voter resides cannot stand. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simplified modes of discrimination.").

10. *See, e.g.*, Col. Rev. Stat. 10-10.5-102 (West 2000) ("Prior to any recount, the canvass board shall choose a precinct at random (Cont'd)

manual recount rights, unlike Florida, almost invariably provide detailed standards by which to conduct those recounts.[11]

(Cont'd)
and a test number of ballots on which to conduct a machine count and a hand count of ballots. The precinct chosen shall have at least fifty ballots for the count. If the results of the machine count and the hand count are identical, then the recount shall be conducted in the same manner as the original ballot count."); Iowa Code Ann. § 50.48 (West 2000) ("If an electronic tabulating system was used to count the ballots, the recount board may request the commissioner to retabulate the ballots using the electronic tabulating system. The same program used for tabulating the votes on election day shall be used at the recount unless the program is believed or known to be flawed"); Neb. Rev. Stat. § 32-119 (West 2000) ("The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day. . . . Counties counting ballots by using a vote counting device shall first recount the ballots by use of the device. If substantial changes are found, the ballots shall then be manually counted in any precinct which might reflect a substantial change."); W. Va. Code § 3-4A-28 (West 2000) ("[Ballots . . .] shall be reexamined . . ., in the same manner . . . utilized in the original vote count. . . . During . . . any requested recount, at least five percent of the precincts shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual recount and the automatic tabulating equipment count of the same random ballots, is equal to or greater than one percent, then a manual recount of all ballot cards shall be required.").

11. *See, e.g.*, Cal. Elec. Code §§ 15628-15631(West 2000) (detailing exact procedures for manual recounts); Ind. Code Ann. § 3-12-1-9.5 (West 2000) (detailing exact standards for "chad irregularities"; Tex. Elec. Code Ann. § 127.130 (West 2000) (detailing exact procedures for manual Counting, including "chad" standards).

Prior to the decision below and the *Harris I* decision, votes in Florida were counted according to an objective system based on approved and calibrated tabulation equipment.[12] Under this system, voters are required to indicate their votes in such a way that properly functioning tabulating equipment will register the vote. For this reason, voters were instructed to carefully check their ballots for mistakes, as exemplified in the instructions used in Palm Beach County and quoted *supra*. When voters followed these instructions, the tabulation equipment accurately tabulated the ballots according to their accepted operational parameters. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recounts at issue below.

Thus, the use of automated tabulation according to uniform performance standards for the tabulation equipment provided both uniformity and objectivity. Moreover, the equipment is accurate so long as ballots are properly executed. For these reasons, the Florida legislature chose to rely principally on automated equipment, with manual recounts being one of a series of remedies to be employed only when the equipment fails to operate as intended.

The decision below throws out the standardized system created by the legislature in favor of undisciplined and result-selective manual counting for the sake of divining the intent

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12. This automated equipment is regulated to ensure that a standardized result occurs for all properly cast ballots. *See* Fla. Stat. § 101.015. The Secretary has implemented this statute through administrative rules that regulate the performance of tabulating machines and designate a defined maximum error rate. *See* Fla. Admin. Code. R. 1S-2.015.

of a voter who does not execute his ballot properly. The only "standard" by which this is to be guided is found in section 101.5614, which provides that a "damaged or defective ballot" may not be discarded "if there is a clear indication of the intention of the voter as determined by the [county] canvassing board."[13] With nothing more than this vague concept to guide the counting, the court below would have a trial judge enlist hundreds of independent counters throughout the state to recount the votes. Yet, there will be no objective standards for these persons to apply during the counting process. The practical effect of the decision below will be that numerous teams of counters will exercise vast unchecked discretion to review improperly executed ballots, and will create *ad hoc* standards for judging those ballots.

Moreover, the partial nature of the recount forces the vote tabulation equipment to be used as, essentially, a screening device to find undervotes.[14] The equipment was not designed for this function. The type of counting the court below directed would require special software to be installed

13. The ballots that were ordered recounted are not damaged or defective. The failure to count these ballots stems from the failure of voters to execute the ballots as instructed, not from defects in the ballots themselves. Thus, the cited statute has no application to the ballots at issue. *Harris II* at 52 (Wells, C.J. dissenting).

14. This partial counting approach results in a different counting method applying to 64 predominantly Republican counties vis a vis the heavily populated and overwhelmingly Democratic Broward and Palm Beach Counties, which underwent *full* manual recounts. It also creates voter differentiation within Florida's largest county, Miami-Dade, where 139 heavily Democratic precincts underwent full manual recounts while the remaining 635 largely Republican precincts were to only have manual recounts of undervotes.

in the tabulation machines. Because of the short time frame involved, there would be no time for the machines and their software to be evaluated for accuracy by the Division of Election as required by section 101.015 and its implementing regulations. Thus, if the decision below were to stand, the voting machines would be used for a purpose that has no basis in the legislative scheme and the resulting recount would be of questionable accuracy as it is impossible to know whether the machines would be accurate in their selection of undervotes for counting.

In his dissent below, Chief Justice Wells correctly recognized that (i) section 101.5614, the statute cited as the appropriate "standard" for manual recounts, was never intended by the Florida legislature to apply to a recount of improperly executed ballots intended to correct for voter error and (ii) the lack of any objective criteria by which to conduct the recount raises serious federal concerns:

> The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

> Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.

Harris II at 51-52 (Wells, C.J. dissenting).

C. The *Harris II* Decision Further Modifies the Legislative Scheme Meant to Ensure Timely Election Results.

The *Harris II* decision has further modified the statutory election certification scheme. The Florida Supreme Court expanded the extension on the seven-day statutory deadline imposed by sections 102.111 and 102.112, Florida Statutes, that it had granted in *Harris I.* Though the Florida Supreme Court held in *Harris I* that the seven-day deadline should be

extended to 19 days in Presidential elections (and presumably longer in local elections), the *Harris II* court held that results received after the statutory and *Harris I* deadline had to be included in the Election Canvassing Commission's certification. The ramifications of this continuing duty to re-certify election results is directly counter to section 102.111, Florida Statutes,[15] and the legislative desire to ensure a timely resolution of election disputes.

Additionally, the *Harris II* decision modified the then existing rule in Florida that county canvassing boards are responsible for determining the number of votes cast for each candidate, Fla. Stat. § 102.141 (2000), and once a canvassing board certifies results, those results are presumed to be correct. *See, e.g.*, *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976) ("[E]lected officials are presumed to perform their duties in a proper and lawful manner . . . . [Accordingly] returns certified by election officials are presumed to be correct.").

D. The Proceedings On Remand Demonstrate the Serious Flaws in *Harris II*'s Demands.

The most cursory review of the proceedings in the Leon County Circuit Court that followed the remand in *Harris II* (Harris App. A), demonstrate the number of changes in the law, lack of standards, and deviations from Florida law in existence on November 7, 2000. Despite extensive objections by both the Secretary and the co-respondents, as well as the Bush petitioners, the Circuit Judge was unable to do more than simply follow the Florida Supreme Court's directions.

15. That section reads, in pertinent part, that "[i]f the county returns are not received by 5 p.m. of the seventh day following the election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified." Fla. Stat. § 102.111 (2000).

(Harris App. B). Thus, with just hours' notice, more than 60 canvassing boards were assembled and instructed to begin counting only ballots with undervotes for President, with some counties having manually counted all votes, some counties having manually counted some votes, and some counties having manually counted no-votes. In addition, no counts were made of all of the votes, nor were counts made of over-votes. *Harris II* ordered the inclusion of partial returns from some counties, as well as some returns, like Palm Beach County's that had never been certified at all, as well as ordering Miami-Dade County votes to be "counted" in Leon County by the Supervisor of Elections or such other personnel ordered by the circuit judge. Unable to allow legal arguments and challenges because of time constraints, the circuit court allowed the filing of written objections to the proceedings. (Respondents' 31 objections are set forth in Harris App. C).

In short, until the entry of this Court's stay of Saturday, December 9, everybody was counting everywhere, under whatever standards they established, without regard to any statutorily-defined criteria.

IV. Conclusion

The Gore Respondents will argue that the decision below is garden-variety statutory construction. The order below, though couched in terms of statutory construction, is actually a significant departure from the pre-election legislative scheme. When "judicial construction of a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The changes outlined above have no basis in the legislative enactments and constitute such a change.

Respectfully submitted,

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APPENDIX

APPENDIX A — TRANSCRIPT OF MOTIONS HEARING OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA DATED DECEMBER 9, 2000

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 00-2808

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State,
STATE OF FLORIDA, et al.,

Defendants.

IN RE: Motions Hearing

BEFORE: HONORABLE TERRY LEWIS
Circuit Court Judge

DATE: Friday, December 9, 2000

TIME: Commenced: 8:35 p.m.
Concluded: 11:39 p.m.

LOCATION: Leon County Courthouse
Courtroom 3D
Tallahassee, Florida

Appendix A

REPORTED BY: B. J. QUINN, RPR, CMR, CP
Certified Realtime Reporter
Notary Public in and for the
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* * * * *

[4] INDEX

ITEM PAGE

PROCEEDINGS COMMENCEMENT 5

CERTIFICATE OF REPORTER 66

* * * * *

[5] PROCEEDINGS

(REPORTING STARTED AFTER HEARING COMMENCED.)

THE COURT: What's your Plan B?

MR. BECK: I think it would be good to reflect this over the evening, because I know you're going to need a Plan B, and I don't think you need to decide that tonight.

What you need to decide tonight, is that people in the counties shouldn't be segregated in the ballots, in the way that makes our life more difficult.

Appendix A

In terms of what needs to be counted, we think that, first of all, the Supreme Court opinion sometimes talks about undervotes.

And by our count, through — in the most recent machine run statewide, there are 64,780 undervotes.

Those are votes, those are ballots, where nobody punched through the chad for any presidential candidate. The Supreme Court elsewhere talks about counting all the nonvotes.

The nonvotes is a broader category. That also includes the ballots where people punched through for two candidates. There's 175,660 of those nonvotes. So we have to sort that through.

We think, also, that it is —

THE COURT: What does the Supreme Court say that I should do about nonvotes?

[6] MR. BECK: I haven't been able to figure that out, frankly, Your Honor. I just know they refer to nonvotes on page 39. And nonvotes, to those who sat through the trial, is a broader category. And those may have to be examined, as well, to see if you can discern voter intent from the nonvotes.

There are also, we have said in this litigation, if you're going to start counting dimples as votes, then perhaps you need to look at all the ballots, because if somebody punched through successfully for George Bush, but then dimpled one for Al Gore, then if that dimple counts as a vote on the other ballots,

it ought to count as a vote on all the other ballots, and that would create an overvote situation. So there's that problem, as well.

But focusing now on the undervotes, we think that you need to look at all of the undervotes in Miami-Dade County, including the 20 percent that were already looked at by the Canvassing Board. And the reason for that, Your Honor, is that it now becomes a judicial function to make sure that they are all treated under the same standard using the same factors.

We have a real serious problem in Miami-Dade County, where we had a Canvassing Board that applied a very, very loose approach of divining voter intent.

And they only went through 20 percent of the precincts, [7] and the 20 percent of the precincts happened to be overwhelmingly Democratic. That's just the sequence they did them in. Now, and they came up with a number of votes that they divined, and Al he Gore picked up a whole bunch of votes.

And, now, unless Your Honor looks at that, again, we're going to start looking at the other 80 percent. And someone is going to be using a different approach that was used for the 20 percent that's heavily Democratic.

The remaining 80 percent, according to the regular votes that came in was actually 52 percent Bush, 48 percent Gore.

So if someone was going to use a real meaningful standard for the Republican parts of that county, then those voters,

including a lot of Hispanic voters, who tended to vote Republican in this last election, are going to have their votes evaluated under a standard that's different than was used for the Democrats.

That creates big problems under the Voting Rights Act for a protected group, like Hispanic Americans, the equal protection clause for everybody, as well as 3 US Code Section (5).

So we believe that the Court is required to include that 20 percent of the Miami votes so that all the votes are counted in the same way.

We also believe that Broward, which underwent a manual [8] recount, those votes also need to be examined by whoever the Court determines should do the examining, using the factors that the Court identifies as appropriate.

What we had in Broward was testimony in this record that they used different standards at different times during the manual counts, and that the standards were much, much looser than, say, the ones that were attempted to be applied in Palm Beach.

So Broward was a very heavily Democratic county, voted heavily for Al Gore. It picks up hundreds of votes in this process in the Canvassing Board, and uses a standard that was not used in Palm Beach, which I believe is not going to be the one that Your Honor sets for the rest of the state.

So we think that the Broward votes have to be reevaluated, using the same factors that Your Honor, we think, will have

to be identifying for the rest of the state. Otherwise we've got the same problems identified before. Different people's votes are treated differently, depending on where they live. And whether their Canvassing Board is all Democrats or has a mix.

So it's my big concern about consistent standards. And then, also, Judge, less controversially, I believe, we got a ruling today from Pensacola concerning Overseas ballots, the Military ballots, that the Democrats had initially succeeded in including. And now the Overseas and Military people [9] should have their votes counted even though they don't have a postmark on the ballot. We'll be giving Your Honor a copy of the opinion.

I haven't seen it, yet, but I understand it was favorable to the overseas voters. So those votes will have to be included in the tally, as well.

We believe that as to where it should be counted, consistent with our position, that the Court should be doing the counting, or at least under the direct supervision of Your Honor, if you're going to use personnel here, that the votes ought to be shipped up here.

We also believe, lastly, on the procedures that, the counting ought to be done in the Sunshine, with observers from each side present. These are going to be factual determinations that are going to be made by somebody under the auspices of the Court. And there are go to be disputes like there were in front of the Canvassing Boards, over whether this stray mark is a vote for Al Gore, or whether it isn't a vote for Al

Gore, and we're going to have to be heard on that. So we're going to have to have some mechanism, where we can have observers present, both sides, obviously.

And we believe that, under Florida law, since this is, essentially, a taking of evidence and an examination of evidence in Court, that needs to be done in the Sunshine.

Now, Your Honor —

[10] THE COURT: Tell me some specifics on that. How many people? What would they do?

MR. BECK: I guess, Your Honor, I don't know, yet, what Your Honor is going to order in terms of who is going to be counting these votes. But I think we basically need to have, for each person or group of people who are counting a set of ballots.

I think we need one observer from each side, who has the opportunity to be heard. And we need this transcribed so that, ballot by ballot, if there are disputes, those can be resolved.

It may be that Your Honor, takes an approach of allowing others to do the first cut. And then disputed ballots, you'll examine yourself.

But if you're going to do that, I think we're going to need a record so that Your Honor can name this evaluation. And even if Your Honor, decides: I'm not going to look at any ballots, we still need a record, because we're still entitled to appeal.

And I don't think that the Supreme Court created a whole new mechanism where not only do we have new people doing a manual recount, but it's conclusive that we're not allowed, even though it's done in the course of a lawsuit, to ever have an appeal or that.

So we're going to need to have court reporters [11] transcribing objections and arguments and records being kept, of which ballots are in dispute. So you can resolved that, or some other judge, or some other Court, can resolve it.

On the question of standards, Your Honor, I guess what I'll do, since I don't know exactly how comprehensive Your Honor's order is going to be tonight I'd like to give you a preview of what our position is, with the caveat that, since we didn't know Judge Sauls was going to be recusing himself, I didn't come ready with a two-hour evidentiary presentation. But let me tell you what I think the evidence showed in this case concerning standards.

THE COURT: I want to hear from Mr. Douglass and you. And it's ten of nine. And I may want to come back and hear some evidence on it, but, really, based upon what you heard, and the evidence, what criteria should be applied, in your mind?

MR. BECK: That's what I'll say, without getting into the evidentiary discussion. I apologize, but we have to say that, both from a legal point of view as well as a factual point of view, we think the criteria are: If you successfully punch the chad through all the way, or if you dislodge the chad partially.

So that it's what is so-called a hanging chad. I trust Your Honor has sort of seen enough in the newspapers to know what a hanging chad is.

THE COURT: Yes, sir.

[12] MR. BECK: But that is a fair indication of voter intent. We think the standard ought to be that a dimple or indentation is not something from which you can discern voter intent. Now, Judge, I want to go to the next step, to Plan B.

If Your Honor decides that you're going to articulate a standard, whether people are going to take into account dimples and indentations, here is what I think the factors are: Number one, the indentation has to come in a stylus, not from a fingernail or a finger.

And believe it or not, we had evidence, Your Honor, you can tell when it comes from a stylus, and when it's just other some stray marking. When it comes from a stylus, it leaves, basically a fingerprint of a stylus. There will be a circular dimple that is the same diameter of the stylus, and you can tell.

So, number one, the only dimples that ought to even be considered, is if they come from a stylus.

Number two is, the stray or so-called rogue dimple; that is, where there's a dimple next to George Bush's name, or Al Gore's name, but the voter managed to successfully vote in the rest of the races, that that is not an indication of voter intent. And it is, in fact, at least as consistent and more

consistent with the hypothesis that the voter chose to affirmatively not to vote for Al Gore or George Bush.

[13] We only heard from one voter. He put his stylus in, he thought about it, searched his soul and brought it out. So that's a man who chose not to vote. If you count that as a vote, you disenfranchise that man.

He's got a right not to vote for either one, we all love our candidates. But I read in the paper there are a lot of people who are not as crazy about either one of them, so they chose not to vote.

So a stray or rogue dimple is not a vote. And that simply is pretty consistently the rule throughout the country. And I hope tomorrow to have an opportunity to present you with the law, as well as the facts on this.

Now, we also did hear evidence from our expert, as well as theirs that, occasionally what happens is people don't insert the ballot in what's called a throat. Instead they put it on top of the device, and then they are never able to punch the chads through.

But both experts said, in that event, you'll see a pattern of dimpled chads. Because there's nothing magic about Al Gore, all the way down the ballot they will have failed to punch the chad through, or in almost all of the races.

So we believe that if you're going to be looking at dimples, which you should not do, that you should only count the dimples where there is a pattern of clear attempts, but [14] failures to punch the chad through.

That is the kind of standard that was attempted to be applied in Palm Beach County to varying degrees of success at different times. It's the kind of standard that was applied in the Illinois case, and in the Pullen case, and it's also the kind of standard embodied in some regulations from around the country.

We think dimples shouldn't count. But if you're going to count them, that's a fair indication of voter intent, that the rogue dimples ought not to be counted.

And one thing we feel very strongly about, Your Honor, what happened in Broward County was just awful. They said: This person voted for a whole bunch of Democrats; and, therefore, I can read his mind and tell that indentation next to "Al Gore" was really a vote for Al Gore.

We feel like trying to read his mind based on what he did in other races is really improper. Because at the presidential race, in particular, people decide not to vote for the head of the ticket or they switch parties, or cross other parties, because they often vote for the man, and the future of the woman, rather than the party. And they have second thoughts, and they often say: I'm a loyal Democrat, but I can't stomach Al Gore. Or, I'm a local Republican, but don't like George Bush. But when you describe intent based on what they did in other races, you disenfranchise those [15] people and water down all the votes of other people in Florida.

So that's my shorthand version of what we think the factors would be. And we hope Your Honor would give us an opportunity to summarize the evidence on it, because there was quite a lot of evidence in the trial record on this.

THE COURT: When do you envision in your procedure that actual counts would begin?

MR. BECK: Well, I think that they ought to begin -- I assume Your Honor wants to move forward expeditiously and not on a leisurely basis. So I think people ought to be working on the weekends here, and I think that the counties ought to be reporting to the Court on their success in segregating the undervotes, and ought to be reporting to the Court the numbers, so that we have it in the record here of the new tabulation, whatever this may be used for in the future, of Gore votes, Bush votes, all the other candidates, and the number of undervotes.

And then once those are segregated, you know, when it should begin, I'm assuming Your Honor is not going to take me up on my suggestion that they all get shipped down to your courtroom and you look at them all.

So I think, then, we're talking about, you know, the day after that.

But I don't know who Your Honor is going to decide [16] should look at these votes.

THE COURT: Whoever, that is.

MR. BECK: Whoever looks at them, I think ought to be looking at them. Basically, as soon as the Court is satisfied they've segregated these in a proper way and recorded the tabulations in a proper way, and as soon as we can get a court reporter and observers from either side there.

So I'm anticipating that some counties may be able to do that process, and conceivably start, you know, tomorrow afternoon. I don't know if they can get it done that fast or not.

We also have a whole issue of — I think the Supreme Court ordered that every county, including the ones that use optical scanners, have to go through this process:

And I'll tell you, I haven't given a moment's thought to what an undervote is, what the implication is in an optical scanning county.

We need to talk to the Court about that. There are some counties with very view undervotes. And it may be an easier task. So the short answer is: As soon as Your Honor has been satisfied that they've been properly segregated and tabulated, and we can get observers there, then I think the counting would begin.

Now, let me also say that we actually intend to seek a [17] stay of this entire matter from the Florida Supreme Court and the United States Supreme Court, because I think that it can't possibly result in anything that's actually meaningful and helpful. And all it's go to do is create constitutional difficulty.

So, but in the meantime, we want to be cooperative with the Supreme Court. So that's what I think ought to be done.

We're just now thinking about who are we going to draft to be observers. I don't know whether it's true. My wife told

me that she was watching television before I came over here, and that she heard that the Democrats had chartered a plane and were flying in 100 lawyers from Washington to act as observers.

So I suppose we'll have to round up volunteers on our side. I don't have a toll free number to call. But we're going to have to get volunteers on our side, as well, lawyers who are going to be with each one of these counters, lodging objections and making arguments.

THE COURT: Anything else?

MR. BECK: No, Your Honor.

MR. KLOCK: Your Honor, we have objections to what the Republicans are suggesting.

THE COURT: The Republicans are suggesting — I'd like the objections, but I'd rather focus on the positive. You tell me what you want to do.

[18] MR. KLOCK: If I can explain why. I don't mean to be mean or problematical. But you have the desirable position of not only reporting to the Supreme Court of Florida, but also having the Eleventh Circuit Court of Appeals and the United States Supreme Court watching what is going on, having orders simultaneously filed in Washington and Atlanta.

Our concern is to preserve the record for a review before the Eleventh Circuit Court of Appeals and also the United States Supreme Court.

And, Your Honor, I'll understand if you don't want to hear it, and we'll just file it in writing. But one thing I'd like to start out with that's problematical, if you turn to page 38 of the slip of the Supreme Court, they say: "Moreover, because the venue of an election contest that covers more than county, lies in Leon County, the Circuit Court has jurisdiction, as part of the relief it ordered," presumably, "to order the Supervisor of Elections and the Canvassing Boards, as well as the other necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation is to take place in the individual counties where the ballots are located." That's what they ordered you to do.

You'll recall the argument put forth before that indicated that the only provision for a manual recount [19] provides for three people that are designated by office. And, Your Honor, the identity of those people are very important, because, for instance, in Dade County, the supervisor of elections, who is one of the three, is a registered Independent.

If you look down here further, after the Supreme Court has said that you're supposed to do it in the county where the votes were cast, they then go on, on page 39, to suggest that, because time is of the essence, the Circuit Court with respect to the Miami-Dade ballots is to go forward and be assisted by the Leon County Supervisor of Elections, or its sworn designees, directly contradictory to the paragraph before. And it's my understanding — I've never met the man — that he is an elected official who ran as a Democrat.

Now, Your Honor, if you look at the transcript when you have the opportunity to look through, you'll find that the

number of votes that are generated through this divining process seems to be tied not only to the number of registered voters of each party in the county, but also who is looking at it.

So our view would be, and we would reiterate and respectfully disagree with our colleagues that are representing the Republicans, that it must be done by the Canvassing Boards, the standards have to be established by the Canvassing Boards there.

[20] And if the Court is going to overlook that, that's fine. But it can't be done the way that it's being suggested that it be done. That would be improper with the statutes. Now, we have a number of objections I'd be happy to go into, but —

THE COURT: The positive thing that you suggest I do is have the Canvassing Boards in the county do the manual recount?

MR. KLOCK: Yes, Your Honor.

THE COURT: Okay.

MR. KLOCK: And then, Your Honor, also with respect to, you know, certain other points that we can raise, we can do it now or later. But the Secretary — the Division of Elections has issued two advisories to the supervisors. And I'll pass one up to the Court, if I may, and pass one around here, with the Court's approval.

And, Your Honor, what our hope is, is we have advised the supervisor of elections they should watch TV so if there is

anything that is ordered from the bench, that it can be immediately implemented.

But, Your Honor there is going to have to be a need to deal with those issues. I assume these people are going to comply without being served. But you never know. And that's something that the Court has to consider, as well.

Another point the Court has to consider is that, you [21] know, this process has now extended — the protest/contest period, which apparently ran together — for a longer period of time. And when, Judge, is to be the appellate review of this process if everything has to be done by midnight on the 12th?

So Your Honor also has to give some thought to a cutoff point. And as has been argued before also under the statutes, if you don't have a complete count done, it is not fair to include them.

And, Your Honor, I would, again, refer black to the testimony that was taken at the trial, where they demonstrated in Miami-Dade County, where the numbering of the precincts starts with one, not surprisingly, starts over by the coast, that heavily Democratic precincts with over an 80 percent Democratic content were counted in the first 135 that they did where they stopped, and then the rest of the county went 53 percent, as opposed to a higher number, I believe 53 percent for Governor Bush.

So, consequently, if you don't do the entire county, again, you're skewing the votes. So you do have to respectfully

figure out a way to have all of these people in all of these counties get everything done. So it's either everything or nothing. And we'd also suggest that the whole state has to be done, or they can't be permitted. There is a statutory provision that says you can't have partial [22] recounts.

THE COURT: When you say, "all the votes," are you talking about all of the votes, or all of the undervotes?

MR. KLOCK: Our position is all of the votes, that's plan A, which Your Honor has indicated you don't have a great deal of affection for.

THE COURT: Plan A was that I personally look at everything.

MR. KLOCK: This was a modified plan A. This is more attractive. But the fact is, again, all the votes have to be looked at, because the overvotes are just as significant as the undervotes, because as you go through the process, if the chads flip this way, they can flip that way.

THE COURT: I'm going by a very narrow thing, and what the Supreme Court told me to do is what would be done.

MR. KLOCK: I'll be happy to put all of our objections in writing, I just don't want the Court to claim its sandbagged later on if these objections are raised.

Finally, with respect to the standard, with respect to what Mr. Beck raised, the only testimony — they had an expert that the Democrats put on. He was asked the following

several questions. He was asked: If you pick up a ballot and you go to the presidential race, and you see a hole punched through all the way, and you see a dimple below it, and another candidate, how do you read that? And he said, [23] well, there's no question. The dimple is a mistake, and the punch-through is correct.

The next question: Well, if you pick up a ballot, and there is only a dimple, and he said: Well, if it's only a dimple, you count that as a vote.

Now, how Your Honor, something that is a mistake in one instance, then becomes not a mistake in another instance, I think points to the fact that anything having to do with a dimple should be immediately suspect, especially since we don't have any standards.

And I don't understand how you can have a standard if something is or is not a mistake or a vote, depending on what you want to do, which gets us back, again, Your Honor, to the Canvassing Boards that have to make these determinations. I guess with some sort of Court supervision.

And if Your Honor wants, we'll put other objections into writing and file them in the morning. We want them in the record, and we want Your Honor to be able to look at them.

And, in addition, I would ask, with respect to what one of the appellate courts is looking at, that is the Eleventh Circuit Court of Appeals, we want to pass up a copy of the Touchtone decision, and its dissent. And particularly call Your Honor's attention to the dissent of Judge Cholak (phonetic) for Your Honor to look at.

[24] I had asked for copies of each of the opinions to be brought over, and, apparently they brought over twice as many of one.

I'll also hand up the Seagull opinion. And the other objections, we'll file in writing.

THE COURT: And I appreciate that many of you may have objections to what needs to be done. My only concern is I'm going to try to do what's been directed. I fully expect you to make your objections on the record.

But if we have to of the this done, what's the best way to do it?

Finally, also, I was just handed this. This is an order of the United States District Judge for the Northern District of Florida which commands that Military ballots that are, as the language says — if I can read this from the ordering clause: "Accordingly the Court hereby orders any state statute, regulation administrative rule, or procedure, that rejects a federal write-in ballot which has been signed pursuant to the oath provided therein, (a), solely because the ballot envelope does not have an APO, FPO or foreign, postmark; or, (b), solely because there was no need for an application for a state absentee ballot, conflicts with federal law. It is further ordered that all federal write-in ballots objected to for the above-stated reasons, are declared valid, this 8th day of December, 2000, by Judge [25] Leahy Collier (phonetic), United States District Court, which, of course, is binding upon the Secretary of the Canvassing Commission. So we'll be in that process, as well, Your Honor.

MR. BECK: Your Honor, there were a couple of points that I either didn't make, or didn't make clear, but I'll at least make them short.

The first one is that on the question of whether there was a statewide standard as to not counting dimples and indentations, there was, we believe, a statewide standard in practice, in effect, which was to count, fully dislodged chads, only, and that the Palm Beach regulation was a recognition of that.

It's not so much that the Palm Beach regulation governs statewide, but it is a reflection of the fact that, statewide, that was the practice and standard.

So if this Court now articulates a standard that allows dimples and indentations to be counted, that will be a new and different approach and standard than was in place in the Court — in the state, although not written up in the state regulations; and, therefore, would violate 3 US Code Section 5.

THE COURT: When you say at statewide standard, where did it come from?

MR. BECK: I think where it came from is probably the [26] instructions that came with the machine, and the instructions that came from the manufacturer, and that the way that votes are tallied, using the Votomatic machine is that somebody dislodges the chad fully, then the light shines through and it counts as a vote for Al Gore or for George Bush.

And no one has ever, previous to this in Florida, counted ballots any other way. No one had ever, previous to this,

using Votomatic ballots, ever used the standard of indentations or anything else. So it was a machine count of the ballots with fully dislodged chads. And to do something other than that is a new and different standard, is your our position on that.

Secondly Your Honor —

THE COURT: It's sort of like a common usage, or common practice, as opposed to some standard proposed?

MR. BECK: It was not a legislatively — it was not written in the statute, but it was — when the officials who determined how votes were to be counted and tabulated brought the Votomatic machines, and followed the instructions from the Votomatic manufacturer, and put the instructions on the back of the voting booth, telling the voters what counts as a vote, and having the instructions in the ballots.

And what the instructions in the ballots say, and on the back of the voting booth say, is that in order to vote, you must fully dislodge the chad.

[27] And it says that, if I haven't fully dislodged the chad you have to pull it off. So there, in fact, were written standards in the form of the instructions that were at the polling place on the wall, and in the back of the booth. We saw it on television. I don't know if you were paying attention to that part of the testimony.

And is written on the ballots, themselves. So the voters are instructed in language adopted by all the local officials across the state who use these machines.

So the standard is in writing, adopted by the local boards and given to the voters. So we do believe we have written standards that say: To vote, you dislodge the chad completely, otherwise it's not going to count as a vote.

So now to change that, we think would be a change in the law and, in effect, in the written standards, which would violate the federal statutes.

And we can elaborate on that tomorrow, if you want.

Then lastly, Judge, whatever procedure you adopt, and whomever you delegate the task to of reviewing the ballots, in the first instance, we think that for all challenged ballots, those should be segregated further, identified by number in some way, a record kept of the objections, and the arguments made, and those should come to Your Honor from around the state.

I don't know how many there's going to be, but they — [28] I think if the standards are articulated clearly enough, I don't think there's going to be very many nonvotes that are transformed into votes. If, in fact, the factors are identified correctly, there's very few people who put the ballot on top of the machine and leave a pattern, because they don't follow the instructions.

So it's not going to be that big an issue, I don't think, if the factors are clearly articulated.

But whatever they are, we think that disputes need to be resolved, in the last analysis, by this Court, rather than by

your — whoever you delegate the initial counting to, because the Canvassing Boards are not given any discretion in the contest. They're not mentioned in the contest.

And if the Supreme Court has decided to order, or to suggest to Your Honor that you can enlist their aid, we think that's a mistake. We think it creates horrible constitutional problems. But if you go down that road, then at the very least, there has to be some judicial review of these determinations that are being made by nonjudicial officers.

So we hope all of the challenged ballots will be bundled up, segregated, brought here to Tallahassee, and then we can have a hearing and go through them.

THE COURT: Mr. Myers? I'll give everybody a chance.

MR. MYERS: May it please the Court, as you may not be [29] aware, I represented West Florida Intervenors in this action. Early on in this litigation we had asked the Court to do a statewide manual recount and asked the Court to take a statewide perspective.

If the Court looks at page 38 of the Florida Supreme Court's decision, you'll see the Florida Supreme Court has agreed with the Intervenor's position that a statewide count should been done. So presumably they agreed with some of the positions we presented.

I wanted to answer Your Honor's question about votes that are no votes, or not undervotes, in other words, the overvotes, and perhaps the Military ballots, or any other absentee ballots.

Appendix A

I took some time to look through the Florida Supreme Court's order, Your Honor, to determine whether you should be ordering a recount of those.

If the Court looks at page 39, you'll see that the Florida Supreme Court has directed you to enter such orders as are necessary to add any legal votes to the total statewide certifications, any legal votes, Your Honor.

And if you look back, you'll see on page 16 of that decision that the Florida Supreme Court also agreed, it says, "We do agree that a manual recount be conducted for all legal votes in this state."

Furthermore, the Court further discusses the need for [30] looking at all legal votes in the State so that every vote that should have been counted is counted for purposes of this manual recount.

On page 11, the Court goes on to say, about halfway through the page, Your Honor: "The right to a correct count" —

THE COURT: What page?

MR. MYERS: Page 11, it's a quotation, as well established in this state by our contest statute. "The right to a correct count of the ballots in an election is a substantial right, which is the privilege of every candidate for office to insist on. In every case where there has been a failure to make a proper count, called tally, or return of the votes as required by law," and this fact has been duly established as the basis for granting such relief, a correct count of all the ballots, Your

Honor, is one of the things the Supreme Court has pointed out to you.

And if you look at page 19, about two-thirds of the way down, over toward the right, you'll see it says, "The clear message from this legislative policy is that every citizen's vote be counted whenever possible."

So I think it's clear, Your Honor, that from the Florida Supreme Court's decision today, that as a floor or a minimum threshold for Your Honor, you must order a recount all of the undervotes.

[31] However, the Court has broadly ordered you to include any legal vote that the Court feels would be there, and also to ensure that every legal vote be counted so that every citizen's vote would count in the State of Florida.

I think it's pretty clear that the Court has the authority to do that here, and that would include absentee ballots, and would exclude the overvotes or no votes that had been registered. I'll represent to the Court that —

THE COURT: Can I stop you for a second? Do you consider overvotes and no votes or nonvotes the same thing?

MR. MYERS: Not necessarily, no, I don't. A no vote would be, for example, the counties reported, and it's part of the record in this case, that the State Elections Commission received a report that there were over 180,000 no votes. And those no votes would include undervotes and overvotes. So the no votes is a more, a broader concept.

THE COURT: So no votes include both undervotes and overvotes?

MR. MYERS: From my understanding, yes, Your Honor. I also point out to the Court that we heard testimony from Judge Burton in this particular trial. We learned that there is now an art to manually recounting the votes. It was readily apparent that he had picked up this art from obviously spending hours and hours from looking at these ballots.

[32] I recommend to the Court that you, at least, at part of the hearing here look at some of the ballots by hand, so you can begin to understand some of the these that you would need to convey to the rest of the boards.

Also, Your Honor, if you would be so inclined to review the testimony of Judge Burton or others who actually went through a manual recount, you'll be able to pick up some of the standards that Mr. Beck was talking about earlier. So I recommend the Court do that.

Notice, you asked Mr. Beck about when and where. First of all, it's clear that the Florida Supreme Court intended that the votes be done in the counties in which they were cast, with the exception of those votes that are right here in Leon County.

We recommend to the Court that, at the earliest, the Court ordered the manual recounts to begin at noon tomorrow on Saturday. That would be sufficient notice for the public to go to the locations of the manual recounts so they could witness this, and also give sufficient time for the observers

who want to be there, to be at the various locations throughout the state.

Any earlier than that, Your Honor, would deprive the public of proper notice to watch this proceeding.

I also recommend to the Court that you have a time certain for reporting the results of these manual recounts so [33] that we can meet our — the deadline that we have on December 12th. I would recommend that noon on Monday the 11th, would be an appropriate time to stop the manual recount and report.

The reason I say that, Your Honor, is it will take time to tabulate the results. And the Court must also consider who do they report? To the Court? Well, who in the Court?

And they need to understand that, because the Court administrator may not be able to physically receive 67 faxes, or I guess it would be more like 63 faxes from the various counties at five o'clock on Monday afternoon, in order to begin tabulating results?

Then, of course, as Your Honor knows, once the counties report, there has to be a tabulation of the statewide count and there need to be time for that to be don. That's why I recommended noon on Monday, at the latest, so that these results can be done.

I also agree with the concept that you have to look at all of the votes, or at least run all of the votes through the machines, in order to identify the no votes that have to be looked at by hand.

Appendix A

I recognize that there's not enough time in the next two days count 6,000,000 votes in the State of Florida.

However, running those through the machines will eliminate the problems Mr. Beck identified, and that is every [34] time they're run through the machine, additional no votes are identified. So we have to make sure we get an accurate count. And that's of utmost importance to the voters in the State of Florida.

THE COURT: Let me ask you this: Every time you run it through the machine, you get a different count. Well, why would the count you do next time be any different than the one you already have?

MR. MYERS: The point is, if they have already run them through the machine and they already have their counts that they've certified — and they've done it twice, we know — then they may not be able to identify which of those votes had registered as no votes, without running them through the machine, again. If Your Honor orders them to only count the no votes, and they haven't segregated them, and we don't know that they have, then you have basically crippled that Canvassing Board from doing their job, and they're going to have a difficult time.

However, if you order every Canvassing Board to run them through, again, you ensure that everyone starts with the same ground zero approach, and that is that we make sure we separate the no votes away. And that way we're much more likely to have an accurate count come in from the Canvassing Boards once they report.

I also agree with Mr. Beck that you have to have [35] objective standards, Your Honor. And that's why I suggest you take a look at the votes. But Your Honor needs to tell statewide what those standards would be, so, again, the count is done with the same standard statewide.

And who will vote? I recommend to Your Honor that the people who vote are people who are experienced with handling these ballots.

Obviously, the Canvassing Boards are the best candidates; however, some of the Canvassing Boards will not have an opportunity to have just those three people that are members of the board do the count in some of the counties that have a large number.

So Your Honor has to consider how can they delegate to people that necessarily may not have any experience.

Let me give you an example: Let's say that Hillsborough County has to manually recount all of their undervotes this weekend. Well, up to now, to my knowledge, they've not had to do any manual recounts, so they haven't trained anybody up to now to know how to do a manual recount. And only the three members of the Canvassing Board are experienced with — and their staff — are experienced with handling the ballots themselves.

So the Court needs to give some direction to the Canvassing Boards, especially in the more populous counties, on how they are to delegate, if at all, to those members who would be [36] working for them, and what kind of training that

they need to give them, in order to have this manual recount done within the two-day time period.

And I suggest to Your Honor, by giving a time certain that they have to report the results, and telling them how they must report the results will, of course, help them establish how fast they have to go through this process, how many people that they will need, and how they would go about it to meet the deadline.

Now it, there are some concerns about how to ascertain the Palm Beach County undervotes and overvotes or no votes. And I'm not sure that that's been handled by the Palm Beach County personnel.

However, Your Honor has to address the fact that those ballots were all shipped up here from both Miami-Dade County and Palm Beach County, and that they went necessarily segregated.

As I recall during last week, they began to separate some of the ballots from each other, and they were ordered by Judge Sauls to stop the separation and just pack them all up and send them up here. And they were doing some sort of separation down in Miami-Dade County, as I recall, or maybe Palm Beach County.

So Your Honor has to get some instruction for the personnel here in Tallahassee, on how the votes have been packaged in Miami-Dade County and Palm Beach County so that the personnel [37] up here have to figure out how they're go to do it.

And let me point this out to Your Honor: I don't believe Leon County has the machines to run the Miami-Dade County and Palm Beach County ballots through the machines to separate them. So that's a concern, because I know when we vote, we use the optical scanners here in Leon County. If that's a concern, then the Court has to address that, as well, is how are we going to have a machine separate them when we don't have a machine here in Leon County that can actually run those ballots through. And that may be that we have to have someone from Palm Beach County or Miami-Dade County to fly a couple of machines up here first thing in the morning so the Court can have the no votes separated from the rest of the ballots, so they can get started on the manual recount.

So those are all the concerns that we have. And from the point of view of voters in west Florida, we just ask that you keep in mind that the voters are the real parties in interest here in this particular case, and that we're trying to be protect the will of all of the voters of the entire State of Florida in whatever standards you give everyone. Thank you.

THE COURT: Thank you.

MR. DOUGLASS: Your Honor, just a short remark. Number one, what I'd like to ask the Court to consider, is that when we have these types of presentations, that we impose some [38] time standard in the matter. In the Supreme Court, for example, you've got so much per side. And you had to divide it.

Consequently we didn't have these long speeches by Intervenors who were in here by virtue of being allowed to

come along as the Intervenors, and not to interfere in the suit.

But I would like to request that the Court consider, when we have these hearings, that we put a time line for that side and this side. Otherwise we — we're usually very short, anyway, and it seems like we're outweighed.

Certainly we're outweighed tonight at least starting out. Our position as stated in our motion, which will be explained by Mr. Boies, is succinctly stated by the Supreme Court, we think, which says, "Time is of the essence," Even in this hearing. The Circuit Court shall commence the tabulation of the Miami-Dade ballots immediately which they described above as the 9,000 undervotes which are segregated.

And the Circuit Court is authorized in accordance with the provisions of 168, which he will refer to, to be assisted by the Leon County Supervisor of Elections, or its sworn designee, which means you may employ others.

And, moreover, since time is of the essence, in any statewide relief, the Court must consider any further statewide relief that should be ordered simultaneously with [39] the Miami recount.

And so what we say, and Mr. Boies will answer some of the things, is that it should begin immediately, as we said, and go forth. And we had suggestions as how that would be done.

MR. BOIES: May it please the Court, my name is David Boies, and I begin by expressing my appreciation and I'm

sure all of the parties' appreciation for sitting this evening. This is something that is obviously very important to us to be expedited.

In terms of what we would like to see the Court do, basically, what we would like to see the Court do is what the Florida Supreme Court has set out in its opinion.

First, there are 9,000 Miami-Dade County ballots that have not been manually reviewed, and those are the ballots that the Florida Supreme Court says should be reviewed immediately here. And they have set out a procedure that they've authorized the Court to use, not instructed the Court to use, but authorized the Court to use, in terms of using the supervisor of elections and that person's sworn designees.

The second thing that we would like the Court to do is to commence the manual recount for counties, other than Miami-Dade County, that have not already had a manual recount.

[40] And I'm confronted a little bit with the Secretary of State saying that it must be done by the Canvassing Boards, and Governor Bush's lawyers saying: It can't be done by the Canvassing Boards.

We believe that the Supreme Court has said that it can be done by the Canvassing Boards. We believe it could also be done here in Leon County, using the Leon County Supervisor of Elections if the supervisor of elections had adequate resources to do that. We don't know whether that's so or not.

If there were adequate resources to do that, we would have no objection to Governor Bush's suggestion. And we believe that that would be entirely consistent with the Supreme Court's opinion; that is, we disagree with the Secretary of State that is somehow precluded. The Supreme Court's opinion, in other portions, makes clear this is a judicial function; that it is not a 166 protest. It is a 168 contest.

Not only the majority opinion, but two of the three dissenting Justices draw that distinction between 166 and 168, and make clear that 168 is a judicial proceeding, and not one where you have to give discretion to the Canvassing Boards.

So if there is adequate resources to do it here, we believe that that would be acceptable under the Supreme [41] Court's view. That's what Governor Bush's counsel has suggested, and we would be agreeable to that, too. Our only concern is whether or not there are adequate resources here to get it done in the time available.

Let me make one point that is a little bit, maybe, of an reargument of something the Supreme Court decided against us, but they've been rearguing a lot on what the Supreme Court decided against them.

THE COURT: Didn't they take my lead, though, when I told him about it?

MR. BOIES: I did, Your Honor. And I'll only mention this one thing, and that is — and I'll do it, in part, because the Intervenor suggested it, as well, and that is the 3,300 votes from Palm Beach. Those were ballots that the Supreme Court

said, we had not shown that the Palm Beach board didn't do those right. No one ever looked at those as a judicial matter.

And if we're going to go beyond the strictures of what the Supreme Court has laid down, we think the very first ballots — and this may have been what the Intervenor had in mind when he talked about the need to look at the Palm Beach ballots.

The first ballots that ought to be looked at are those 3,300 ballots that are already here.

But we don't want to do anything until after everything [42] that the Supreme Court has ordered to be done has been done.

Once that's done, maybe there's some things that they're suggesting that we could do. Maybe there's some things that we're suggesting that could be done. But I think the Supreme Court has made clear that there are certain limited things that have to be done immediately, and those are the things that we would ask the Court to focus on, at least first.

In terms of when, we think the Court meant immediately when it said, "Immediately."

Hours make a difference here. We would like to see the process with respect to the 9,000 Miami-Dade ballots start immediately. First thing tomorrow morning.

We would like to see the counties directed to start first thing tomorrow morning. If the counties are going to do it, or if it's going to be done here, that they be instructed first thing

tomorrow morning to get the ballots here so they could be done here.

We think that hours are going to make a difference here. And the Court knows, I think, may know, that Palm Beach was shut out of the certification process because it finished its manual recount 127 minutes late.

Minutes may make a difference here. So we don't want to have any delay.

Let me just talk, in response to some of the individual [43] points that were made.

First, there was a question of what undervote meant.

The Court, the Supreme Court does use the term undervote and nonvote or no vote. I think it is clear from the context that all of those words are being used in the same sense; that is, a ballot for which there was no vote recorded for the presidential race.

There are overvotes where there are two or more votes recorded for the presidential race.

That's not what the Supreme Court was talking about. And, indeed, when you look at the use of the word, nonvote, or no vote, the Supreme Court uses that in the context of the 9,000 Miami-Dade votes.

And there's no dispute that the 9,000 Miami-Dade votes are undervotes.

So we think that what is at issue here are undervotes.

If somebody wanted to look at overvotes at sometime if there was time, I'm not sure we would have an objection to that.

But what we absolutely would object to is anything to do with overvotes, or any other votes, until we get what the Florida Supreme Court has ordered to be done, which is a review of all the undervotes.

The number that was given to the Court of about 64,000 undervotes may be somewhat high, because I think that number [44] may include undervotes from Broward County and Palm Beach County, which, of course, are two of the three largest counties with undervotes.

And those votes have already been taken care of by the Supreme Court.

In terms of the criteria to be used, we think the Supreme Court's opinion is quite clear. They talk about the clear intent of the voter, and we believe, that's always been the appropriate standard in Florida. Judge Labarga in Palm Beach County, issued two opinions on that.

And those were opinions that we had thought previously from what the Defendants had said, were opinions that they agreed with.

Those opinions make clear that it is not a punch-through standard, it is not a hanging chad standard. It is the intent of the voter, looking at the entire ballot.

We think that if you look at the cases the Supreme Court cites in its opinion, in its opinion, the Florida Supreme Court

says, "There are a number of other states that follow the same principle," and they give three examples, Massachusetts, South Dakota, and Illinois.

And if you look at those three cases, and you look at what the Supreme Court of Florida says about those cases, I think you also get a sense of what the appropriate criteria is to use to identify the clear intent of the voter. For [45] example, the South Dakota case, the Duffy case that the Supreme Court cites in its opinion today, is a case that the Florida Supreme Court characterizes as holding that if you see a mark of some kind where a voter would ordinarily make a mark in order to vote, then, unless there's something that clearly indicates that that's not a vote, it should be considered a vote.

The Dellahunt case, which is a Massachusetts case that the Florida Supreme Court also cites in that same paragraph, is a case that holds that where you have an indentation on or near the chad, that should be counted as a vote.

The Pullen case, which is the third case, this is an Illinois case that the Court cites there, although it doesn't quote the Pullen case in this opinion, it did quote extensively from the Pullen case in its November 21 opinion, also talks about looking for what the reasonable interpretation of what the voter's intent was from the entire ballot.

So I think that the Supreme Court has made it clear, not only what the standard is, but what, if you need to be specific about particular criteria, what those criteria are.

So we think that that is something that does not need to delay the process.

We don't have an objection to them presenting to the Court summaries of evidence. We can present summaries of [46] evidence, too. It will not surprise the Court that there are some pieces of evidence that Mr. Beck did not mention that we think are important for the Court to consider.

But fundamentally, the Supreme Court of Florida has decided these questions. It has decided that there is go to be a manual recount. It has decided that that is not going to include all of the 6,000,000 ballots. It's only going to include the undervotes.

It's decided that those counts need to start now. It's decided that those are going to be done as a judicial matter, except to the extent that there are ballots in other counties that can be done there, or can be done here.

So I guess the bottom line, because we think the opinion is pretty clear, and we just think that it needs to be implemented as quickly as the Court is prepared to do that.

THE COURT: Well, in terms of who is going to do it, you say you don't care whether it's done by somebody up here, or the Canvassing Board, or the supervisor of elections down in the counties?

MR. BOIES: That's true, Your Honor. The only qualification is if, in consultation with the Supervisor of Elections of Leon County, the Court were to conclude that the resources here were not sufficient to do it, or it would — I don't think this could possibly be the case, but if for some [47] reason we couldn't get the ballots up here; that is, if there was any

practical consideration that meant that bringing the ballots here would make it unlikely that we were going to get it done, then we would say: Get it done in the counties.

And I think that's what was motivating the Florida Supreme Court. I don't think the Florida Supreme Court was saying: If has to be done in the counties, because elsewhere in the opinion, they make clear this is a question for judicial resolution.

But if we could get them here and get them done here on time — and I think the number is such that you probably could, because I think the 54,000 number is too high. And if the number were closer to 40,000, which is what I think it is, I think that is something that could be done in a period of time, if you had enough teams.

I guess the only other thing I would say is obviously, we don't have any objection to having observers. In the Supreme Court's Bechstrom's case, what happened there was that the Circuit Court had the Clerk of the Court review the ballots with a representative of each side present.

THE COURT: Clerk of the Court?

MR. BOIES: In that case, that was the Clerk of the Court. That was the 1998 Bechstrom court case.

THE COURT: Two observers?

MR. BOIES: One observer from each side watching it. [48] The only thing that we would ask is that the process not get

booked down. The Court is well aware, with lawyers, you can make every ballot a federal case, to coin a phrase.

And I think that there are enough federal cases already in this matter. And what we need to do is we need to get on with the counting process.

All we really want is for the count to start soon, and to progress, so that we can fulfill what the Supreme Court has said, which is to get it done on time.

We think that if the counting is going to go down in some of the counties, they need to report by tomorrow at the end of the day, what their schedule is for completion, and how much they've gotten done. Many counties ought to be finished tomorrow. And we think that the Court can't wait until Monday to get reports.

I think the Court is going to have get reports on a daily basis to make sure there is not some problem that we don't know about that is too late, and we can't solve it.

MR. KLOCK: Your Honor, if I can address a couple points, very quickly. First, Palm Beach County, Mr. Boies referred to as being 127 minutes late. Currently they are 17,500 minutes late because they still have not filed a certificate indicating what the additional votes are that were due at five o'clock on the 26th.

The next point, Your Honor, is for those of us that are [49] local lawyers, generally speaking the stuff that is closer to the end of the order is more significant. And I would suggest

that while Mr. Boies thinks the Supreme Court is sort of suggesting you can do it any way you want, I would refer you to the language at the bottom of 38: "Moreover because the venue of an action of an election contest covers more than one county than Leon County, the Circuit Court has jurisdiction to order the supervisor of elections and the Canvassing Boards, as well as the necessary public officials in all counties that have not conducted a manual recount or tabulation of the undervotes in this election, to do so forthwith. Said tabulation can take place in the individual counties where the ballots are located. That is nine lines before the "so ordered" language.

In addition to that, Mr. Boies has excellent recall. He indicated to Your Honor, he says, "Because time is of the essence, the Circuit Court, shall commence the tabulation of the Miami-Dade ballots immediately. But if you move on another sentence or two, it says, moveover, since time is also of the essence in any statewide relief, the Circuit Court must consider any statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade votes.

Two other points, Your Honor, the Florida Supreme Court, in the last paragraph says that that is defined under [50] 101.561(5) of the Florida Statutes.

And when you compare it to the opinion, a legal vote as it is used there, is one that is decided by the Canvassing Board.

So the little adjustment to the Supreme Court's decision, is to go in and have the Court reexamine the 3,300 votes that

were determined as illegal votes by the Palm Beach County Canvassing Board, and recognizes at the beginning of the Supreme Court's opinion, they are illegal votes forever, Your Honor. So they can never be recounted.

And I think the only other point I wanted to mention is with respect to overvotes and undervotes, you also have the problem when you get into the optical scanning votes, Your Honor. You simply can't do what they want to do with the undervotes, because, Your Honor, when you get to the optical scanning, sometimes what folks do is put an X in the box, instead of a complete circle. Sometimes it reads; sometimes it doesn't.

It clearly is as important a vote as a dimpled chad or something that is caused by a fingernail rubbing across a ballot, and clearly needs to be looked at. Sometimes, also, Your Honor, they color in the little box, or the little circle, rather, and they write the same name below it.

That is considered an overvote by the machine and not counted as well. That needs to be looked at.

[51] And then the final point I had, Your Honor, was that — that may be it. But these points are very important to be taken into consideration.

The final point is there needs to be time for appellate review. And the idea of having daily tallies — the purpose of this drill, Your Honor, is to conduct a complete manual recount. Not to create opportunities for press conferences, two or three times a day to indicate how our guy is doing depending on whether you start at the bottom or the top end of the precincts.

So all this information has to be tallied at one time, because, otherwise, what it's going to be is a public spectacle which is going to be worse.

THE COURT: Let me ask you something, because the Secretary, at least it appears, doesn't have a preference for one side or the other. You're a Defendant because that's your job, and you have to certify the results.

Would you have any problem with, in terms of the logistics of getting results from the other counties, that they do it as they normally would do, which is to send it to your office?

MR. KLOCK: That would be nine. They know how to do that and they do it. And, Your Honor, with respect to the other arguments that are being made, under 97.012, the Secretary also has the responsibility for the uniformity of [52] elections, and how they're conducted and that kind of thing. So that is the reason why the other objection.

You're correct, Your Honor, the Secretary does not have, as Secretary, a horse in the race. Nor does the Attorney General.

MR. GREENBURG: Your Honor, if I may, this is Murray Greenburg in Miami.

MR. DOUGLASS: That's what I was waiting on. It really wasn't, but I wanted to suggest this —

MR. GREENBURG: If I may, you have the ballots and all our elections —

THE COURT: Mr. Greenburg, can you wait a minute? I'll certainly let you talk. But I got a couple of them standing up there. I won't leave before I let you talk. Okay?

MR. BECK: Your Honor, I'd like to address a couple of points Mr. Boies raised.

THE COURT: Just one second, I think he's got a procedural point.

MR. DOUGLASS: I would suggest, again, we be a little more formal, because we made a presentation, they made a long, long presentation. We made a presentation. And that, normally, in most proceedings, then the Court takes over and asks questions.

We don't want to get into this, again, because Mr. Beck is one of the longest speakers I know, and I would like to [53] ask that — and he's from Illinois and they do things different there. But I would like to ask the Court to, please, if we could set some structure that would prevent this, where we finish, and they get up, again, because — if it's just a little thing like the Secretary, he had a point there.

But, you know, we're going to be here forever. So I'm asking the Court, if we could, consider that, certainly, in future hearings.

THE COURT: Well, I can consider it right now, actually, because it is almost ten o'clock now, and I need to do something, otherwise we will be talking about what we're ease going to be doing forever.

MR. BECK: Your Honor, what they did in their presentation —

THE COURT: Let me stop you, Mr. Beck. I don't want to argue back and forth and objecting. What I wanted is input. And if you don't have any more input for me, that's fine. But if you have something that you should tell me I'm going to do, I will listen.

MR. BECK: I do, Your Honor. I first want to reinforce what the Secretary of State's counsel said, that we also are concerned about running tallies and press conferences. As far as we're concerned, there is no number that comes out of these things until the Court resolves any disputes as to [54] ballots.

And the Court ought to be releasing the information when it's done with its work, rather than having running voting tallies. So that as soon as, you know, one candidate gets in front of another, all of a sudden people are claiming victory. We ought to have the Court resolve the disputes and then release the results.

Another item that is also on your plate is you're going to need to hear from us both tomorrow, I would suggest, about how many there are down in Palm Beach.

Mr. Boies as used the number 215, which the Supreme Court used, but the Supreme Court also noted in a footnote, that we say it's a lower number, and that they take no positions on that. You're going to have to resolve that.

Appendix A

Your Honor, the Supreme Court says on page 39, when talking about Miami-Dade, about the counting machine registered these as nonvotes and they've never been manually reviewed. We think you have to look at all the nonvotes, not just the subset of undervotes.

Mr. Boies argued the South Dakota case as if that meant that any kind of dimple or indentation is an indication of intent.

I have the South Dakota case. What they say about — they talk about two chads in the South Dakota case. And one of them was good old chad number 88, and they say, "Two of [55] the four corners of this chad had been broken and one side is separated." So that's a hanging chad. The other chad was a patterned chad, where they say, "It's important to note that when this ballot is viewed in its entirety, at least four additional chads are partially punched in the same manner."

So the only chads that were at issue in the South Dakota case that the Supreme Court referred to, were either hanging chads, or the kind of patterns that we talked about, not the kind of rogue dimples that they want.

Judge, in terms of the stages of a recount, and I don't want to bore you with the gory details. I suggest we present you with something in writing about the stages that people go through in a recount.

We think, briefly, that the counties ought to cull the nonvotes out from the other ballots, preserving the integrity of the counts, the way I referred to before.

We think that the Court should announce what factors are to be examined when determining voter intent, the criteria that are relevant to that determination.

THE COURT: I think you're summarizing your previous argument. I've got to get going.

MR. BECK: Okay. The last point, Judge, is Mr. Boies was absolutely wrong when he said three times that somehow Governor Bush suggested that the Leon County Supervisor of Elections was the right person for doing the job.

[56] We say the Court should do it. The Leon County Supervisor of Elections — I don't know him, and I'm sure he's an honorable man and a good public servant, but he's also a loyal Democrat.

Democrats on the Canvassing Boards of Miami-Dade and Broward County made the decision that turned hundreds of nonvotes into votes for Al Gore. And now they're suggesting that a Democrat in Leon County make the determination concerning the Republican counties, and we don't think that's right.

THE COURT: I think the Supreme Court is suggesting that the supervisor of elections in the counties may assist the Court in making the count. And I don't think the Democrats are suggesting anything.

MR. BECK: I'm suggesting to the Court that it's the Court's decision to make. It was authorized to do that by the Supreme Court. We think it's a bad idea. We don't think that if the

concern is with public confidence and the integrity of the election, you should do that.

THE COURT: Let me ask all sides on this. The other counties, theoretically, as per the order, would have the Canvassing Board doing the counting, like they normally would, or somebody down there in the counties. What if the ballots were taken to Dade County, and a similar procedure was used there and then report back just like they normally [57] would? Any reason why it has to be done here?

MR. BECK: You said Dade County?

THE COURT: Yes. I'm suggesting to you —

MR. DOUGLASS: I understand.

THE COURT: Is there any reason why we couldn't take the Dade County ballots down to Miami, and let the people that normally would count them, count them.

MR. BECK: I think on that one, the Supreme Court was fairly clear. I thought the Supreme Court directed the Court to undertake that task. I think it left open to the Court to undertake the rest of the task, but that one, specifically, was directed to the Court to do it.

THE COURT: Well, yes. But, theoretically, they asked me to use the supervisor of elections here, or sworn designee. Is there any reason why that couldn't be the Dade County folks?

MR. BECK: We would object to that. We think the Court ought to be doing that, under the standards articulated by

the Court we don't think that's contemplated by the Court's order.

THE COURT: Anyone else?

MR. BOIES: Just very briefly, Your Honor. I think we would agree that the Miami-Dade ballots ought to stay here. Our reasons are a little different, but I think the time consumed in sending that number of ballots back down, and [58] then getting the results back, would defeat the purpose of the immediate review.

THE COURT: Okay.

MR. BOIES: With respect to Mr. Klock's point in which he said that that, in reference to these ballots being reviewed in the counties, nine lines from the end, it is nine lines from the end, about, maybe a little more, but in those nine lines is where the Supreme Court talks about the Court having the assistance of the supervisor of elections.

So I think you could use the supervisor of elections, if the adequate resources were there.

And, third, with respect to the criteria to be used, it seems to me, if you're looking at the Duffy case, which is South Dakota case, the right thing to look at is how the Florida Supreme Court characterized that whole thing.

THE COURT: Mr. Greenburg, it's your turn. Do you want to say anything.

MR. GREENBURG: Yeah, but, Judge, let me just say this at this point: We will do whatever the Court wants. We're here to assist the Court, the supervisor, and all the officials here in the county.

What we need to know — and I think Your Honor will agree with this — we need to know soon. Our ballots are there; we're here; we're fine with that.

(LAUGHTER.)

[59] MR. GREENBURG: The next plane would require our getting up at 4:30 in the morning, which is fine. But we need to know what you want to do, who you need up there.

And if it's just going to be legal argument, what time you would want anybody, we will do whatever you want. You've heard enough from all the lawyers, myself included. Just please tell us what you want us to do and we'll do it.

THE COURT: Thank you. I'm going to take a recess and consult the high authorities and be back with you — I won't tell you when, but I'll be back before the evening.

And I'm sorry to make you wait, and I know everybody as been working overtime, but I'll have to come up with something, having had input from you, that I think will work.

I'll be back to tell you what I think it is.

(DISCUSSION OFF THE RECORD.)

Appendix A

RULING BY THE COURT

THE COURT: I apologize for keeping you all waiting. I know it's late.

Well, we've got two different counts to be concerned with. One is the Dade County ballots that are here in Leon County. The other involves the rest of the counties in the state. This is not perfect, but I'm going to give you what I plan to do with regard to both of those counts. You may have objections to that. You may have questions about it. But because of the lateness of the hour, and the exigent [60] circumstances, I ask that you make your objections in writing and give them to me tomorrow morning through the Court Administrator's Office. And I'll take some action on that and review them at that time.

First of all, when we do the count, what we're going to be looking at are what are considered nonvotes or undervotes.

Those would be where a counting machine does not register the vote, or does not register all the vote.

For the Dade County vote, which is still here in Leon County, we will keep the ballots here and count them here.

I'm going to ask the supervisor of elections, or his sworn designee, I'm going to ask that Mr. Sancho contact Mr. David Leahy. Do we still have Mr. Greenburg?

I guess that was a long time for him to wait on the phone.

I believe he was the attorney indicating they'd be willing to help any way they can. The staff of the Clerk of the Court is available for the purposes of helping in the count, the Supervisor of Elections can work with the supervisor in Dade County to the help count those votes.

I'm very concerned with the perception of these votes, and whether they're going to be done accurately and fairly. In that respect, I've asked my colleagues here in the Second Circuit to assist in this.

[61] Theoretically, I guess we've had counts normally with teams of two. Normally there's a Canvassing Board there that would resolve any questions about whether a vote is or is not a vote. That's the way I understand this goes. For those teams of two, I have asked two judges to act as arbiters, basically, if there's a question about that, and those judges can resolve that dispute or question about the ballot.

If those two Judges can't agree, it will be sent to me and I'll resolve that finally. That's how we'll do the vote here.

I'm going to have them start tomorrow morning at eight o'clock.

And I believe the facility will be the Leon County Public Library. They'll have some room there to accomplish that.

The press will be allowed. We'll make arrangements. Any questions about how to do that should run through the proper administrator's office. The counting that's done there will be open for observation by the parties.

But what I'd like to do, even though this has been said in many Court cases so far, the voters are the real party in interest. There are two candidates here, that would be Governor Bush and Vice President Gore.

You can have anybody you want designated for a team. But all the rest of you, I'm sorry, I'm just going to leave [62] it that way. If you can get them to let you there, you can be an observer, as well.

If we start at eight, my target date — not my final date — but I hope to be finished no later than two o'clock p.m. on Sunday, which would be December the 10th.

As we discussed before, the Secretary of State, and the Divisions of Elections will assist.

It won't be necessary for ours here, but I'd rather go ahead and probably use that in terms of sending the results that we have here, through the Supervisor of Elections to the Division of Elections for a certification of those results.

At — and I want to emphasize: This is not a protest count of votes. This is a count of votes as a result of a contest of an election, under which there is broad powers, apparently, for the trial judge to fashion a remedy.

So when I say there will be observers at the county, there won't be as you would normally have in a protest, the opportunity to make an objection to each ballot, to mark it, to see it.

You'll be able to observe. You can make a note on a notepad, if you'd like. You can raise those objections later in writing with me. But in terms of each individual ballot, I want the county to go as smoothly as possible. As I've indicated, there will be at least two other judges available to arbitrate any questions there. But I don't want anybody [63] raising a vocal objection at the time of the voting, or otherwise trying to disrupt the count in any way.

Now, for the other counties, just as the Supreme Court has indicated in its order, I would respectfully direct Canvassing Boards in the counties who have not, or have not previously done a manual count of nonvotes or undervotes, to take steps immediately to do so. Specifically, I would request that, by twelve o'clock p.m. tomorrow, Saturday, fax to the Office of the Court Administrator, which I do have that number somewhere, the fax number. Do I have somebody from the Court Administrator's office here? I sure don't want to give out mine. (850) 487-7947.

What I'd like faxed there is some indication of the protocol purported or proposed by the Canvassing Board. And this could be the Canvassing Board, but not limited to the Canvassing Board. But such other public officials, including the Supervisor of Elections, and their offices, staff, employees, whatever is necessary in their estimation to do the count required by the Supreme Court with, again, a target date of 2:00 p.m. on Sunday for those results to be sent from there to the Division of Elections for certification. The same procedure would apply in terms of the observers, in terms of the objections, and the indications that I had before as to the vote in Leon County. I'm not going to direct exactly how to

do that. I'm [64] going to leave that to the discretion of the Canvassing Board, in terms of deciding the parameters of who would do the counting and how they'll do it. To my colleagues around the state, my judicial colleagues, I would request that you offer your assistance in the same manner my colleagues here in the Second Circuit have offered, for the reason I have indicated, to give some objectivity and partiality to the process itself, to reduce, to the extent possible any objections to the manner in which it was conducted. I'm not directing that or ordering that, but simply a request. And I'll leave it to the Canvassing Boards to decide how they will best do it. But they will report by twelve o'clock the protocol they intend to use, the estimated time schedule, and I'll review that at that time. The standard to be applied in doing this count is the standard that the Supreme Court has set forth in its recent order.

The Supreme Court has twice been given the opportunity and requested to get more specific criteria in terms of how to count ballots manually. They've declined to do so. And I see in that a clear indication that they wish to leave that to the Canvassing Boards and the persons that do the manual counting, guided only by that principle that's laid out in the opinion.

I think I indicated, I would ask that the Canvassing [65] Boards in those counties, when they've completed their counts, to forward that through the normal procedures to the Division of Elections for certification.

And with that, I know you probably have questions and objection. As I indicated before, if you'll put those down in

writing, I will do my best sometime tomorrow morning to reduce this to writing. And if I could get a transcript, that would help me. I would appreciate it. But I need something in writing.

MR. BECK: We will put our objections in writing in the morning. I just want to alert the Court that there was an outstanding matter in front of Judge Sauls. We had made a motion to exclude the Miami-Dade ballots on grounds of ex —

THE COURT: Mr. Beck, I just said, put all your concerns in writing. I will not hear any thing more tonight.

MR. BECK: I'm concerned that the counting is going to begin before the Court hears the evidence on whether the ballots are in shape to be counted.

THE COURT: I understand. Any concerns you have, any objections you have, put them in writing. I'll review them in the morning. Put them through the Court Administrator's office. I'll be in touch with the attorneys through the Court Administrator's office. We may meet again, but that's what I'm going to do. Thank you very much.

(HEARING CONCLUDED AT 11:49 P.M.)

Appendix A

[66] CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Certified Realtime Reporter, Registered Professional Reporter, and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing deposition was taken before me at the time and place therein designated; that before testimony was taken, the witness was duly sworn; that my shorthand notes were thereafter transcribed, via computer, under my supervision, and the foregoing pages numbered 1, through 66, are a true and correct record of the aforesaid proceedings. I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL
this, the day of OCTOBER, A.D., 2000,
IN THE CITY OF TALLAHASSEE,
COUNTY OF LEON, STATE OF FLORIDA.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850)222-5508
My Commission Expires March 20, 2001

Appendix A

CERTIFICATE OF NOTARY

STATE OF FLORIDA:
COUNTY OF LEON:

I, B. J. QUINN, Notary Public in and for the State of Florida at Large, do hereby certify that the witness personally appeared before me and was first duly sworn by me to testify to the truth on the date and time indicated herein.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850) 222-5508.

APPENDIX B — ORDER ON REMAND OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA DATED DECEMBER 9, 2000

IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 00-2808

ALBERT GORE, JR., AND JOSEPH I. LIEBERMAN,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,

ORDER ON REMAND

This case is before the Court upon remand from the Supreme Court of Florida in ***Gore v. Harris***, No. 00-2431 (Fla. Dec. 8, 2000), and upon recusal of the original trial judge. Pursuant to the instructions provided by the Supreme Court of Florida, the Court will immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed. The Court will include in such tabulation the additional legal votes for Gore in Palm Beach County and the 168 additional votes from Miami-Dade County.

In accordance with the provisions of Section 102.168(8), Florida Statutes the Leon County Supervisor of Elections or its sworn designees, which may include election officials

from Miami-Dade County, will assist the Court with the manual recount. The counting process shall begin at 8:00 a.m. on Saturday, December 9, 2000, at the Leon County Public Library with sufficient two person teams of counters so as to complete the count by 2:00 p.m. on Sunday, December 10, 2000.

In determining if a legal vote has been cast, the standard to be applied is: if there is a "clear indication of the intent of the voter" then the vote should be counted. If not, the vote should not be counted.[1] If there is a question in this regard as to any ballot, it shall be reviewed and determined by a team of two judges from this circuit, several of which will be on-site. If the two judges do not agree, the ballot will be segregated and reviewed by me for final determination. No partial counts will be done or reported, formally or informally.

For each team of counters, Plaintiff Gore and Defendant Bush may designate one person to act as an observer of the process. This person may not make a verbal objection or challenge to any particular ballot determination nor in any way disrupt or interfere with the counting process. Any objections or challenges shall be in writing and filed with the Clerk of Court.

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1. Some of the parties have requested that I establish specific criteria to utilize in applying this standard. The Florida Supreme Court has been asked at least twice recently to do so and has specifically declined. The only guidance is the language in the statute quoted above.

Appendix B

The Supervisor will report the final results to the Court upon completion, and shall certify the results to the Division of Elections. Any additional votes as determined by this Court in resolving disputed ballots shall be added to these totals for certification by the Division of Elections.

The Court, consistent with the Supreme Court's Opinion, hereby directs that the Supervisors of Election and the Canvassing Boards, with the assistance of any necessary public officials, in all other counties that have not conducted a manual recount or tabulations of the non-votes or undervotes to do so forthwith, said tabulation to take place in the individual counties where the ballots are located. The standard to be applied in determining what is a legal vote, the time targeted for completion, and the method of reporting results, shall be the same as noted above for the counting of the Miami-Dade County votes.

In the interest of promoting the public's trust and confidence in the objectivity and impartiality of the counting process, the counties are urged — but not required — to enlist the services of its judges where appropriate, in a manner similar to the process outlined above. The method and manner of the count shall be determined by the Canvassing Boards.

The Canvassing Boards of the respective counties shall fax to the Court at (850) 487-7947 by noon, Saturday, December 9, 2000, a report as to their proposed protocol for the count and an estimate of the time to complete, and any problems anticipated by the Boards are also directed to advise the Court by 10:00 a.m. on Sunday, December 10, 2000, as

to the status of the count, and from time to time as the Boards deem appropriate.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of December, 2000.

s/ Terry P. Lewis
TERRY P. LEWIS, Circuit Judge

APPENDIX C — OBJECTIONS OF SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION DATED DECEMBER, 2000

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA, CIVIL DIVISION

CASE NO. 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for the President of the United States, et al.,

Plaintiffs,

v.

KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, et al.,

Defendants.

OBJECTIONS OF SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION

Under Section 97.012, Florida Statutes, the Secretary of State is the Chief Elections Officer of the State of Florida. It is the Secretary's duty to obtain and maintain uniformity in the application, operation, and interpretation of Florida's election laws. Under Section 102.111, Florida Statutes, the Canvassing Commission certifies the returns of the elections and determines and declares who has been elected for each office. Accordingly, pursuant to the Court's directions, the

Appendix C

Secretary of State and the Canvassing Commission hereby submit their objections to the process and standards for the statewide partial manual recount ordered by the Florida Supreme Court in this presidential election and in this Court's order, entered in open Court at 11 p.m. on December 8, 2000, in accordance with the Florida Supreme Court's judgment (the "Order," all collectively the "Procedure") as follows:

1. There is insufficient time, due to the impending federal deadlines to complete any manual recount with any degree of accuracy applying meaningful standards.

2. The Procedure permits no opportunity for meaningful appellate review or for meaningful review by this Court of the decisions and conclusions reached in the various counties conducting the partial manual recounts.

3. Any manual recounts undertaken must be on a statewide basis, and must be of all ballots, not a subset of ballots culled though standardless and undefined exercise of unreviewable discretion of persons and entities not before the Court who are attempting to identify "undervotes" for further review.

4. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the partial manual recount of ballots solely to address voter error.

5. There is no basis in the Florida Statutes in existence prior to November 7, 2000, that would permit a manual recount of ballots in circumstances other than for the reasons and in the manner set forth in section 102.166(4) to (7).

6. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a manual recount in Miami-Dade, Broward, or Palm Beach Counties following the results of the manual test undertaken by each county's canvassing board pursuant to Section 102.166(4) prior to the initiation of the manual counting.

7. To the extent that the Court is ordering a recount of less than all ballots, it must at least consider all ballots including overvotes, undervotes, and any other category of "non-votes."

8. There is no basis in Florida law in existence prior to November 7, 2000, to undertake only a count of undervotes when those numbers of votes are to be added to additional votes gleaned from a larger selection of votes.

9. The law of Florida in place on November 7, 2000, did not permit the elections supervisor or canvassing board of one county to count the ballots of another county.

10. There is no basis in Florida law in existence prior to November 7, 2000, that would permit Miami-Dade County's ballots to be counted in Leon County outside of the presence of voters from Miami-Dade County and by officials other than those identified in sections 102.166(7).

11. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

Appendix C

12. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the counting by machines or by humans of other than fully punched chads.

13. There is no basis in Florida law in existence prior to November 7, 2000, that would permit some races in Florida to be decided on statewide manual recounts while others are not.

14. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the Miami-Dade Canvassing Board to use a software program that supposedly separated "undervotes" from properly voted ballots when such program has not been approved in advance by the Division of Elections, as required by Florida law. The Secretary objects to the sorting of ballots based on software that is untested and uncertified by the Florida Division of Elections in violation of preexisting Florida law and practice.

15. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a circuit judge to order ballots to be counted without requiring the counting individuals to measure each ballot against the instructions provided to the voters when using the punch-card and ballot voting devices as required by Florida Statute section 101.46.

16. To permit individuals drawn from the Leon County Circuit Court to sort and make canvassing board decisions for Miami-Dade County votes differentiates Miami-Dade County voters in that their votes are not being counted by fellow county citizens drawn from the same county and they are deprived of local standards that were available to voters in Broward and Palm Beach counties.

Appendix C

17. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the manual recount of all ballots in some counties such as Broward, Palm Beach and Volusia counties while the recount of votes in other counties are being limited to "undervotes."

18. The Secretary objects to the Procedure and any partial statewide manual recount which results in abrogating the rights of citizens under the equal protection and due process clauses of the United States Constitution.

19. The Secretary objects to the counting of ballots from Miami-Dade County under a process separate and distinct from the process to be applied in the other counties of Florida without meaningful standards.

20. The Secretary objects to conducting a partial manual recount in the absence of any valid, coherent reason for such a recount and without an evidentiary basis supporting the necessity of any recount.

21. The Secretary objects to a manual recount of a less than all the ballots of Miami-Dade County because there is no evidentiary basis to conclude that the subset of ballots culled from Miami-Dade County for a manual recount constitutes votes which have not previously been counted. The process ordered is likely to result in the counting of votes multiple times and therefor the dilution of other votes not so counted.

22. The Secretary objects to the inclusion of the Palm Beach County recount because to this day, no executed return

of results from Palm Beach County has ever been submitted and there is, therefore, no legal basis for including such votes in any final tally.

23. There is no basis in Florida law in existence prior to November 7, 2000, that would permit assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on computer punch cards.

24. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on marksense ballots.

25. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a court to establish the procedures for undertaking a manual recount of ballots and in determining voter intent.

26. Any attempt by a court to establish criteria and standards for determining voter intent invades the province of the legislature in the selection of presidential electors.

27. The Procedure intrudes upon the powers and duties of the Secretary and the Commission by stripping both of any but ministerial duties in the election process.

28. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a selective county challenge of a statewide race or the challenge of races that extended beyond any one county without the objector seeking a recount in all of the counties affected by the race.

Appendix C

29. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

30. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the circuit court to issue advisory opinions regarding the conduct of the balloting and tabulation process.

31. The Secretary and the Commission object to the procedure to the extent that the Procedure violates Sections 102.141(2), 101.572, or the Florida Sunshine Law.

Dated this __ day of December, 2000.

Respectfully submitted,

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Appendix C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the forgoing was served by facsimile to the following attorneys on this __ day of December, 2000:

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Appendix C

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Appendix C

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